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6 UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

7 JOHN LEONARD CALVERT,

8 Petitioner,

9 v.

10 CHARLIE DANIELS and ROB  
11 MCKENNA,

12 Respondents.  
13

NO. CV-05-077-RHW

**ORDER DENYING MOTION TO  
DISMISS WITH LEAVE TO  
RENEW, EXTENDING TIME**

14 Before the Court is Petitioner's Motion to Dismiss Petitioner's 28 U.S.C. §  
15 2254 Habeas Corpus Petitioner Without Prejudice (Ct. Rec. 42), in addition to a  
16 Notice that Petitioner's Re-Sentencing Has Been Rescheduled (Ct. Rec. 53) and  
17 two letters addressed to the Court (Ct. Recs. 54 & 55). In his motion, Petitioner  
18 states he is unable to comply with the Court's July 20, 2006 order denying his  
19 motion for stay and abeyance (Ct. Rec. 36), in which the Court ordered him to  
20 clearly amend his petition or withdraw it. However, Petitioner's motion to dismiss  
21 was filed before the Court issued its August 28, 2006 order denying his motion for  
22 reconsideration but granting an extension for him to comply (Ct. Rec. 44).

23 Petitioner also made clear in his motion to dismiss that its sole basis was  
24 Petitioner's inability to comply with the Court's prior order in a timely manner.

25 After receiving the August 28, 2006 order, Petitioner filed his notice of re-  
26 sentencing (Ct. Rec. 53). In this notice, Petitioner asks the Court for a new time  
27 table in which to comply with the Court's orders due to the fact he did not receive  
28 the August 28, 2006 order until September 9, 2006, and because he is currently

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1 being housed in a location separate from his legal materials due to his impending  
2 re-sentencing. The Court construes this notice as a motion for extension of time.

3 Petitioner's letters illustrate the difficulties he is having accomplishing legal  
4 work on his various habeas petitions (Ct. Rec. 54) and his current efforts to exhaust  
5 his State court remedies in this case (Ct. Rec. 55). From this later correspondence  
6 and from the content of Petitioner's original motion to dismiss, it appears to the  
7 Court that Petitioner does not wish to voluntarily dismiss his Petition at this time,  
8 but rather that he asks for an extension of time to comply with the Court's August  
9 28, 2006 order.

10 The Court reminds Petitioner that he is ordered to either (1) amend his  
11 Petitioner to include only his exhausted claim, clearly presenting and supporting  
12 with documentation his Petition for Writ of Habeas Corpus; or (2) file a motion for  
13 stay and abeyance that (a) shows good cause for his failure to exhaust his  
14 remaining claims in state court, (b) demonstrates those claims are not plainly  
15 meritless, and (c) demonstrates he has been diligent in his pursuit of *state court*  
16 remedies. In the alternative, Petitioner may make clear to the Court that he still  
17 wishes to voluntarily dismiss his claims. Contrary to Respondent's argument in its  
18 response to Petitioner's motion to dismiss that the Petition should be dismissed  
19 with prejudice, Petitioner is also free to voluntarily dismiss his Petition without  
20 prejudice to exhaust his claims in State court. *See Slack v. McDaniel*, 529 U.S.  
21 473, 488-89 (2000). However, Petitioner is put on notice that if he chooses this  
22 option, he may only return to federal court with exhausted claims, *id.* at 489, and  
23 the one-year statute of limitations in the AEDPA may bar further consideration of  
24 his exhausted claims. *Rhines v. Weber*, 544 U.S. 269, 275 (2005).

25 Accordingly, **IT IS HEREBY ORDERED:**

26 1. Motion to Dismiss Petitioner's 28 U.S.C. § 2254 Habeas Corpus  
27 Petitioner Without Prejudice (Ct. Rec. 42) is **DENIED** with leave to renew.

28 2. Petitioner's Motion for Extension of Time (Ct. Rec. 53) is **GRANTED**.

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1           3. The Court takes judicial notice of Mr. Calvert's re-sentencing before the  
2 Honorable Edward F. Shea on November 30, 2006. Taking into consideration the  
3 time it will take to travel back to FCI Sheridan, the Court grants Mr. Calvert **sixty**  
4 **(60) days** from entry of this Order to either (1) amend his petition to include only  
5 his exhausted claim, clearly presenting and supporting with documentation his  
6 Petition for Writ of Habeas Corpus; or (2) move again for a stay and abeyance by  
7 (a) showing good cause for his failure to exhaust his remaining claims in state  
8 court, (b) demonstrating that these claims are not plainly meritless, and (c)  
9 demonstrating that he has been diligent in his pursuit of *state court* remedies. In  
10 the alternative, Mr. Calvert may renew his prior motion to voluntarily dismiss his  
11 petition without prejudice, taking into account the effect a voluntary dismissal may  
12 have on this Court's jurisdiction to hear his claims. Absent any action, or in the  
13 event Mr. Calvert submits a third mixed petition, the Court shall dismiss his  
14 Petition with prejudice. Respondents shall thereafter have **twenty (20) days** to  
15 respond. Petitioner shall thereafter have **fifteen (15) days** to reply.

16           4. The District Court Executive shall **set** a case management deadline **one**  
17 **hundred twenty (120) days** from the entry of this Order.

18           **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
19 Order and forward copies to counsel and Petitioner.

20           **DATED** this 25<sup>th</sup> day of October, 2006.

21                               *s/ Robert H. Whaley*

22                               ROBERT H. WHALEY  
23                               Chief United States District Judge

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